Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Annual Assessment of the Status of	)	MB Docket No. 17-214
Competition in the Market for the	)	
Delivery of Video Programming	)	

REPLY COMMENTS OF COMCAST CORPORATION AND NBCUNIVERSAL MEDIA, LLC

Comcast Corporation and NBCUniversal Media, LLC (collectively, "Comcast") hereby submit reply comments in response to comments filed in the above-captioned proceeding.[1] The record shows that today's video marketplace is highly competitive, driven by fierce competition among traditional multichannel video programming distributors ("MVPDs"), as well as by the continued strong growth of online video distributors ("OVDs") that are further transforming the video landscape. As NCTA observes, the Commission's own reports have confirmed that "true competition exists – among [MVPDs], between MVPDs and [OVDs], and among program networks and other programming distributed on MVPDs and online."[2] NAB describes the "increased competition in the video marketplace [that] has significantly benefited consumers, with the amount, variety, and quality of TV programming growing exponentially in recent years."[3] And Verizon observes that a "frenzy of competition" has taken hold in the video

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[1] *Media Bureau Seeks Comment on the Status of Competition in the Market for the Delivery of Video Programming*, Public Notice, 32 FCC Rcd. 6654 (2017).

[2] NCTA Comments at 2. Unless otherwise noted, all comments cited herein were filed in MB Docket No. 17-214 on October 10, 2017.

[3] NAB Comments at 2.

marketplace, providing consumers with an abundance of choices of providers and options of where to watch their preferred content.[4] These and other comments underscore the "explosive growth in the amount, quality, and diversity of content available to consumers."[5]

Despite the overwhelming evidence of vibrant competition, certain commenters continue to use the Commission's annual review of the status of competition to push for more regulation. For example, the American Cable Association ("ACA") uses its comments to raise claims regarding NBCUniversal's contractual terms with certain of ACA's members and to request regulatory measures that are both beyond the scope of the report and wholly unwarranted.[6] Specifically, ACA argues that NBCUniversal's minimum penetration terms for its regional sports networks ("RSNs") – marketplace terms to which ACA's members have agreed – are set at a level that precludes some of ACA's members from broadly selling a broadcast basic service tier. ACA asserts that these terms are overly restrictive because they do not exempt broadcast basic service tiers from the penetration requirement, are designed to benefit Comcast Cable, and should be banned under the Commission's program access authority.[7] These arguments are all without merit.

As an initial matter, it is notable that ACA spends the first six pages of its comments stressing that RSNs are very valuable to its members, but then argues in the remaining five pages that a standard industry requirement for MVPDs and OVDs to commit to broadly distribute this programming should be deemed unlawful. In other words, ACA wants government-mandated access to valuable and costly programming at a price that contemplates broad distribution by

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4 Verizon Comments at 1-2.

5 Comcast Comments at 1.

6 *See* ACA Comments.

7 *See id.* at 7-11.

ACA members, but also wants its members to be able to restrict the distribution of that programming as it sees fit. Thus, ACA is not asking the government to ensure fair treatment by enforcing non-discriminatory, marketplace terms and conditions. Rather, it is asking the government to *disregard* those terms and impose non-market terms in their place. For a cable programmer whose content is valuable and popular enough to warrant broad carriage, however, the minimum penetration commitment is a key part of the consideration it negotiates. A programmer understandably seeks some assurance as to the number of subscribers with respect to whom it can expect to obtain license fee and advertising revenues – revenues that help defray the significant cost of creating the content and, in the case of RSNs, acquiring and paying for very expensive professional sports exhibition rights.[8] Programmers, like all business owners, must have the ability to reliably project revenues – and the number of subscribers for whom license fees will be paid and with respect to whom advertising can be sold is the key input in this calculation. Without accurate revenue projections, programmers cannot maximize their investments in future programming. Further, prohibiting a programmer from even seeking such a commitment in negotiations would most likely both increase the price of the programming and make parties *less likely*, not more likely, to come to mutually agreeable terms on all the related economic points.

To put ACA's desired regulatory intervention in concrete terms, suppose that an MVPD has 100,000 customers, and a programmer with valuable and popular programming has

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8 All RSNs depend on broad distribution within a necessarily limited *regional* market. That is to say, a national network, with over 100 million potential subscribers to reach, is better able to absorb the reduction of customers if a smaller MVPD (of say 100,000 customers) does not carry the network, or carries the network at a less penetrated level. But RSNs' potential MVPD customers are much more limited – on the order of 3-10 million customers, depending on the market – so every lost subscriber has a far greater impact on the RSN's bottom line. *See* SNL Kagan, *TV Network Summary,* https://www.snl.com/web/client?auth=inherit#industry/tv_NetworksSummary (last visited Nov. 6, 2017).

negotiated a commitment that its programming will be received by 85 percent of such customers – which yields the programmer 85,000 subscribers from that MVPD. That provision still leaves the MVPD significant room – 15 percent of customers – to market services that do not include that programming. An 85 percent penetration requirement that *excludes* all broadcast basic customers, however, does *not* provide the same certainty, although it provides significant unilateral flexibility *to the MVPD*. If broadcast basic (and potentially other) excluded customers stay exactly at 15 percent of all customers during the contract period, then 85 percent (of 85,000 customers) yields 72,250 subscribers. That may well be sufficient, and the programmer can confidently project revenues from such carriage over the life of the contract, *but only assuming that the MVPD is willing either to promise that it will keep the broadcast basic tier stable for the duration of the agreement, or to cap the exclusion of broadcast basic subscribers at some reasonable level*.

By contrast, what ACA is suggesting is that there be a government-mandated *uncapped* exclusion of broadcast basic – no guaranteed minimum carriage level at all – which allows the MVPD to down-convert as many higher-tier customers as it can to broadcast basic customers, to the extent it perceives doing so to be in its business interest. Thus, again using the above example, if the MVPD's broadcast basic tier were to grow to 30 percent of its customer base (i.e., 30,000 customers), that same 85 percent penetration rate, excluding broadcast basic, would yield the programmer only 59,500 subscribers. Even a 90 percent penetration rate would yield only 63,000 subscribers. That is a far different economic proposition for the programmer – a 25-30 percent fall-off in subscriber fees and potential advertising revenue from the programmer's projections/expectations based on 85,000 subscribers. For ACA's members that wish to heavily market a broadcast basic tier, that is an awfully good deal: They get access to valuable programming for those subscribers who want it, at lower prices that contemplate broad distribution, but without then following through on the broad distribution that justified those lower rates in the first place. For the programmer, however, it is the *opposite* of a good deal – especially if produced not through fair and reasonable negotiations by private parties, but rather through one-sided government regulation.

This type of heavy-handed governmental regulatory intervention in the marketplace – shaping a programmer's business model by prohibiting specific types of contractual terms – likely would have been unwarranted at any time during the past 25 years (since the 1992 Cable Act), but is especially insupportable at a time when the programming and distribution marketplace is more competitive than ever before. The fact is that ACA's members can choose not to carry RSNs at all, as many MVPDs have, if they believe that will free them to market skinnier programming packages to their customers. Or they can propose alternate license fee arrangements that would compensate the RSN for less distribution certainty. That is how a competitive and dynamic marketplace is supposed to work – not by enlisting the government's help in regulating out of existence terms that one party happens not to like.

As to ACA's program access allegations, they are also uniformly misguided. Contrary to ACA's claims, NBCUniversal's minimum penetration provisions are not discriminatory and do not constitute an unfair practice or unfair method of competition that hinders significantly or prevents an MVPD from providing programming to its customers.[9] Indeed, NBCUniversal has

[9] Section 628(b) has never been interpreted to prohibit a specific type of carriage contract term or terms. And even the prior Commission, after conducting an inquiry as to whether it should regulate minimum penetration requirements, did not include such a proposal in the otherwise ill-advised NPRM it issued on independent programming. *Compare Promoting the Availability of Diverse and Independent Sources of Video Programming*, Notice of Inquiry, 31 FCC Rcd. 1610 ¶ 20 (2016) (including questions about minimum penetration) *with Promoting the Availability of Diverse and Independent Sources of Video Programming*, Notice of Proposed Rulemaking, 31 FCC Rcd. 11352 (2016) (omitting the subject altogether).

reached arm's-length agreements with MVPDs and OVDs of all sizes that include these terms. And other programmers have similarly explained why they too seek minimum penetration guarantees.[10]

Nor are these provisions designed for the implausible purpose of driving customers away from ACA members and to Comcast Cable. Like other programmers, NBCUniversal seeks to have its programming available to as many potential viewers as possible. This is *not* because Comcast owns NBCUniversal, but because NBCUniversal naturally wishes to recoup its investment in high-value content and increase viewership in order to drive better ratings and higher advertising, which in turn allows it to continue to invest in the best programming available – just like the many non-vertically integrated programmers that ACA has complained about in various other filings over the years.[11] NBCUniversal has done so by making all of its programming available at fair market value not only to all MVPDs, but also to numerous OVDs that have entered the marketplace in recent years (and months). This is hardly the behavior of a programmer that is trying to shield its affiliated MVPD from competition.[12] As to ACA's notion that these RSN carriage terms will drive ACA members' broadband customers to switch to

[10] *See* Reply Comments of CBS Corporation, The Walt Disney Company, Time Warner Inc., 21st Century Fox, Inc., and Viacom, Inc., MB Docket No. 16-41, at 5 (Apr. 19, 2016) ("[F]avorable tier placement and penetration thresholds help make program channels more attractive to advertisers, which in turn gives programmers access to revenue while they build out their audience base. Minimum penetration and tier placement guarantees also comprise part of the consideration programmers exchange when negotiating license fees. The absence of such commitments effectively gives MVPDs the discretion to relocate an independent network to a less penetrated tier or drop the network altogether, which deprives the independent programmer of the benefit of its bargain.") (citations omitted); *see generally* Comments of Comcast NBCUniversal, MB Docket No. 16-41, at 33-34 (Mar. 30, 2016).

[11] For example, as ACA told the Commission just last year: "ACA members report that *each of the largest programmers* insists on distribution to the vast majority of a small cable operator's subscribers for many, if not all, of its networks. They do so either by naming the tier on which to be carried ('expanded basic' or 'the most penetrated tier other than broadcast basic'), by naming a minimum percentage of subscribers to receive the programming, or through some similar mechanism." Comments of ACA, MB Docket No. 16-41, at 26-27 (Mar. 30, 2016) (emphasis added). ACA went on to single out AMC and Fox for criticism in that filing. *Id.* at 27.

[12] To the extent the customer would be inclined to switch providers of video services, given the numerous MVPD and OVD alternatives now available, it is even less likely that *Comcast Cable* will stand to benefit.

Comcast's *broadband* service to obtain a bundle of broadband plus a skinny package of video programming, ACA has no answer to the fact that broadband-only customers have a substantial (and growing) number of OVD choices that often include local broadcast programming (among other channels), so such customers would have no need to switch *broadband providers* to obtain the programming packages they want.

Given that such minimum penetration commitment terms are reasonable and reflect fair market value for the programming, it is unsurprising that ACA members have not pursued a single arbitration over the fair market value of RSN programming over the nearly seven-year period during which the NBCUniversal arbitration conditions have been in place – even though they had a right to standalone arbitration for RSNs on terms that were specifically tailored to benefit ACA's members.[13] Nor has any ACA member filed a program access complaint over an RSN or any other NBCUniversal programming during this period. In light of this absence of any evidence of harm, ACA's call for an investigation into these matters – and for an extension of the NBCUniversal arbitration conditions – rings completely hollow.

Finally, contrary to ACA's suggestion, Comcast's Xfinity Instant TV is not a service that is designed to or that would have the effect of violating Comcast's minimum penetration obligations to programmers, including NBCUniversal. While Xfinity Instant TV is a cable service, and as such certainly counts in calculating Comcast's compliance with various minimum penetration requirements, it is targeted at a fairly narrow set of customers – "cord-nevers" who would not otherwise sign up for traditional cable TV service. Moreover, as one industry report aptly observed, "[u]ltimately, Comcast is banking on a portion of the broadband-only households

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[13] *See* Press Release, ACA, *ACA Commends FCC For Protecting Consumers And Competition In Comcast-NBC Universal License Transfer Order*, Jan. 18, 2011, http://www.americancable.org/aca-commends-fcc-for-protecting-consumers-and-competition-in-comcast-nbc-universal-license-transfer-order/.

it's targeting will simply decide to upgrade to full-fledged Xfinity X1 service – with the operator viewing Instant TV as a kind of on-ramp for its video biz."[14] In short, Comcast is not exiting the field of providing robust cable TV service; it is attempting to meet competition and serve new consumers in a new way. And it is doing so while honoring the contractual obligations to which it has agreed – including those like the ones about which ACA complains – with affiliated and unaffiliated programmers alike.

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The Commission should conclude that the video programming marketplace is highly competitive at all levels, and should reject ACA's attempt to use this proceeding to encourage the Commission to intervene in this highly competitive marketplace and put a thumb on the scale to aid ACA's members' business objectives.

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[14] Todd Spangler, *Comcast Debuts 'Xfinity Instant TV' Skinny Bundle for Broadband-Only Users*, Variety, Sept. 26, 2017, http://variety.com/2017/digital/news/comcast-xfinity-instant-tv-launches-1202573808/.

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November 9, 2017